United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

JAMES HINES	]	
v	]	No. 18260
UNITED STATES	]	

BRIEF OF APPELLANT

715

EDWARD L. GENN
514 Colorado Building
Washington 5, D. C.
Attorney for Appellant
(Appointed by the Court)

QUESTIONS PRESENTED

Questions presented are:

(1) Whether the Court erred in instructing the jury in the issue of criminal intent.

(2) Whether there was a Mallory violation.

(3) Whether there was lack of probable cause for the arrest.

(4) Whether, even if probable cause and no Mallory violation, the evidence was such that the issue was improperly determined by the trial court.

(5) Whether improper reference was made to defendant's prior conviction.

Index of Authorities

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

JAMES HINES]

v.] No. 18260

UNITED STATES]

BRIEF OF APPELLANT

I. Jurisdictional Statement.

This Court has jurisdiction by virtue of Title 28 U.S.C. 1291.

II. Statement of the case and the facts.

On July 2, 1963, along with one, Warren Johnson, the petitioner, James Hines, was convicted of the offense of robbery in the United States District Court for the District of Columbia and on July 12, 1963, was sentenced to serve a term from two to six years. The charge involved the theft of $16.00 on or about April 5, 1963 from a newsboy, Sylvester or Slyvester Ellis. On July 15, 1963, Hines' request to appeal that conviction by proceeding on appeal in forma pauperis was denied by the entry of the following statement from the District Court Judge: "Denied. Not in good faith. No substantial question and in my judgment, frivolous. Indeed, no question is present."

Thereafter, in accordance with the practice and rules of this Court the petitioner appealed to this Court from the denial of a certificate of probable cause. On August 21, 1963, this Court entered an Order granting the petitioner leave to prosecute his appeal to the extent of being furnished with portions of the transcript of the trial proceedings. Counsel was appointed and granted time within which to file his Memorandum. This Court

thereafter granted the Petitioner to appeal in forma pauperis.

The foregoing state the essential facts to indicate the nature of the charge and the case. Such additional facts as are necessary to the points are stated briefly in the following sections.

III. Argument

A. The Trial Court erried in instructing the jury on the issue of intent: As stated previously, this case involves a charge of robbery against the Defendant, James Hines. The indictment charges that by force and violence James Hines and one, Warren Johnson, Jr., stole the sum of $16.00 from Sylvester Ellis on April 5, 1963. Hines was represented by court-assigned counsel, Robert Maynard; Johnson, by John Curry.

The Court instructed the jury as to the elements of the offense of robbery under Title 29, §2901. The Court's instruction appears in the Appendix attached hereto. The Court was requested to instruct on intent and agreed to do so. (Appendix pp. A-a through A-d)

The significant portion pertinent to the issue at hand is on the question of intent. On this instruction the Court stated as follows: "Turning now to the second element that the defendant took the property unlawfully and with the intent to convert it permanently into his own purpose. Intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind. But intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his acts." (emphasis supplied) (Appendix A-b)

It would appear that, as stated in the Appendix hereto, counsel requested an instruction on criminal intent.

It is suggested that this instruction is erroneous. Even if counsel did not make clear a specific objection to this instruction, it is suggested that well established authority would treat this as plain error, requiring a reversal because it is a misstatement of the law.

Was the instruction on intent erroneous?

It will be noted that the instruction states that one may presume intent of a criminal nature from the natural and probable consequences of one's acts for the reason that "a person is presumed to intend the natural and probable consequences of his acts."

It will be recalled that the case at bar involves a robbery. It would appear plain that a robbery charge or any like charge requires a finding of specific intent; that is, a specific intent of a very definite nature to be found as a fact and not to be presumed from a fact. See: Ryan v. U.S. 26 App.D.C. 74, 81 (in cases of larceny the specific intent to deprive the owner of the property is a necessary element of the defense); Masters v. U.S. 42 App.D.C. 350, 357, 358; Midgett v. State, 139 A.2d. 209, 217, 218, 216, Md. 26 and cases cited in these authorities.

It has been stated abundantly and clearly that where specific intent is required, the courts cannot under any circumstances employ a presumption to supply the missing element of specific intent. See; Imholte v. U.S. 226 F.2d 585; Berkowitz v. U.S, 213 F.2d 468, 473, Wardlaw v. U.S. 203 F.2d 884. Cf: U.S. v. Nedley 256 F.2d. 350.

Stated differently, the courts have held that when a specific intent to commit an offense is a necessary element of the offense proof of such intent may not be eliminated by a generalization that a man is presumed to intend the natural consequences of his acts. Imholte v. U.S., supra. Berkowitz v. U.S., supra.; Wardlaw v. U.S., supra. Cf: U.S. ex. rel. Vraniak v. Randolph 261 F.2d 234.

The leading decision on both the subject or criminal intent and on the subject of presumptive rules of evidence as applied to that intent is the Supreme Court decision of Morisette v. U.S. 72 S.Ct. 240, 255 et.seq. , 342 U.S. 246 et. seq. (theft of Government property).

No useful purpose can be served in restating here what Morisette discusses in a scholarly and eloquent opinion on the subject.

Suffice it to say that Morisette makes clear that presumptions of intent cannot be permitted in cases such as this. Intent is a fact to be found. It is not to be "presumed" from acts. To permit such presumptions conflicts with the overriding presumption of innocence. See: Morisette v. U.S., supra, page 256.

Assuming that the Court erred in instructing on the issue of intent, and assuming that counsel did not specifically or sufficiently object to the instruction, is the instruction of such a nature as to be plain error, requiring a reversal.

The issue here assumes that the rule of law asserted by the petitioner is accurate. It further assumes that the record is not sufficiently clear that objection to the instruction was preserved. Under both of these assumptions, it is, nonetheless, suggested that the instruction was

plain error andthat this Court should accordingly reverse.

It is undoubtedly true that in most instances, unless specific objection is made, the error is not preserved for the purposes of appeal. It is submitted, however, there is one exception, one clear exception. See: Rule 52(b). It is where a vital, essential element of the offense is erroneously defined or misstated. For example, in the case of Haner vs. U.S. 315 F.2d. 792, 794 (C.A. 5, 1963) the Court ruled where the charge misstated the law (e.g., the definition of wilful used in a statute under which the defendant was charged with a "wilful" failure to file income tax returns) plain prejudicial error existed and reversal was required. Reversal was granted even though there was no objection made to the charge. Cf also: Perkins v. U.S. 315, F.2d 120, 123, 124 (C.A.Wash. 1963). Cf: Crosby v. U.S. 314 F.2d, 238, 240 _____ U.S. App. D.C. _____ (1963) (coerced confession question not "harmless error.")

The issue that has been suggested is not a "harmless" one. It involves a claimed misstatement of law on an essential element of the offense. As indicated heretofore, robbery is an offense which requires a finding of specific intent. The elements that a court defines for the jury are so vital to a case that no fair trial can be afforded, unless the court, even without the assistance of counsel, correctly and properly instructs the jury on the elements of the offense and the proper meaning of those elements.

Here it is urged on the basis of the foregoing authority, that a finding of intent cannot be resolved by a presumption, by a reference to a generalization than men presume the natural and probable consequences of their acts.

A clear line must be kept between an inference and a presumption. Even if a jury might infer specific intent from facts and attendant circumstances, it cannot do so by a presumption, by direction of law. See: Bray v. U.S. 113 U.S. App. D.C. 136, 140, 306 F.2d. 743. To do otherwise would conflict with the presumption of innocence and the principles set forth in Morisette v. U.S., supra.

It might be stated in this case that there is an additional specific reason why such an instruction could be deemed to be prejudicial, wholly apart from its being a misstatement of law. It appears from the transcript of the testimony that the Defendant Hines asserted that while he was present at the scene of the offense, he did not commit a robbery and that such money that he picked up was his own which he had in his hand at the time. (Tr. 42) There was no warrant (Tr. 45). There was an instruction and some evidence of flight. There was not only direct evidence but circumstantial evidence surrounding the alleged event. Even if the jury chose to disbelieve the direct evidence of the person who was supposedly robbed, it could have "presumed" a specific intent from the so-called natural and probable consequences of Hines' acts, the very issue which was the vital one in the case --- the issue of criminal intent. In sum, it is submitted that the issue was so vital in this case that no fair reading of the record would suggest that the point now asserted is harmless error.

This is not all.

B. The trial Court erred in its ruling on the alleged confession.

The petitioner's pro se petition asserts a claim of arrest without probable cause. The facts are, as often the case, in dispute. At the trial the Court heard testimony by Detective Brown and by Defendant Hines on the circumstances of arrest to this effect: Hines claimed that he voluntarily went to the police station on April 5, 1963, on word that the police wanted to see him; that he was arrested for another offense that evening and was not arrested for the instant offense until the following morning; Detective Brown stated Hines was arrested and booked on the evening of April 5, 1963, and orally admitted his part in the alleged robbery at bar after some twenty minutes; no written confession of Hines was offered; Johnson and Hines both testified at the trial after the ruling on the "confession". Johnson admitted he called to Ellis and claimed he jostled Ellis as a caper; Hines who had claimed to live at the premises where the alleged robbery took place admitted being at the scene of the jostling but denied any robbery; Johnson's testimony appeared to support Hines; on the Police Offense Report Form, filled out on April 6th, in that portion requiring the officer to write down any statement made by the arrested person, Officer Hilton who was with the other officers at the time of arrest stated that nothing appeared in the report showing any alleged oral confession. (See Tr. 29-33, 35-37).

Crosby v. U.S., 314 F.2d. 236, _____ U.S. App. D.C._____ makes it plain that a hearing on a coerced confession is mandatory. But a hearing must be full and it should not involve either a restriction on cross-examination or a hasty ruling on credibility. After Hines testified, Detective Brown testified. Counsel for Hines sought to show that Hines was correct

and the officer incorrect in the light of records --- records which showed Hines was booked for another offense on April 5th and not booked for the instant offense until the following day. (Tr. 51) The Court hastily ruled and too quickly eliminated this interrogation. The incident occurred as appears on Appendix A-f and A-g. In doing so, it unduly restricted examination on a vital question. See: Lindsay v. U.S, 77 U.S. App. D.C. 1, 2 et seq., 133 F.2d. 368 for full discussions showing, e.g., that while the Court has "discretion" to eliminate further interrogation, it is only as to when a relevant subject is exhausted.

Further it is suggested that if in fact the police questioning were on another charge, then there was no showing of probable cause to hold Hines overnight on that charge. Still further, even if probable cause existed, for that charge, it would appear that Mallory was violated. If the facts showed an arrest on another charge and even if there were probable cause to hold Hines on that charge, he should have been promptly brought before a committing magistrate. He claimed, and the records appear to show, that he was instead held overnight under arrest on another charge (Tr. 38). Failure to bring him promptly before a magistrate after arrest for another robbery would have been improper. See Trilling v. U.S., 104 U.S. App.D.C. 159, 260 F.2d 677, Coleman v. U.S. 114 U.S.App.D.C. 185, 313 F.2d, 576. All the more reason why the proof on the records as to the basis of the arrest should have been allowed and the decision on this preliminary question withheld.

IV. The United States Attorney improperly examined on a claimed conviction for disorderly conduct.

Appearing in the attached Appendix is the questioning of the Government as to prior convictions (See: Appendix A-j, et. seq.)

It will be noted that such questions involved disorderly conduct and unauthorized use.

On the claim of disorderly conviction, it is submitted that the proper rule has been stated to be this:

> "It would not be proper to show for impeachment purposes that the witness had been convicted of disorderly conduct, of violating the traffic laws of either state or municipality or that he was convicted of crimes not involving moral turpitude. Coble v. State, supra; State v. Hickman, 102 Ohio App. 78, 141 NE2d 202." Smith v. U.S., 283 F.2d 16, 87 A.L.R.2d. 394, 403.

Compare Clawans v. D.C. 51 App.D.C. 299, 289, 62 F.2d. 303.

The fact that Hines had a conviction for unauthorized use does not render a question on disorderly harmless. First of all, many jurors might treat an "unauthorized use" case as a "lark." Secondly, the appearance of two prior convictions gives substance to the feeling of "habitual" offenses whatever the contention may be as to "credibility." The fact that Hines denied the disorderly conviction is beside the point. The United States Attorney should not have asked the question before the jury. A proper objection was made. Even sustaining the objection would not cure the cumulative effect. The United States Attorney's Office should rightly be held to a standard which precludes such attempted attacks on credibility.

CONCLUSION: For the foregoing reasons, the verdict and judgment below should be reversed or a new trial granted.

Respectfully submitted,

EDWARD L. GENN
Attorney for Appellant
514 Colorado Building
Washington, D.C.
(Appointed by this Court)

APPENDIX

Now, the statute on which this one count indictment is based insofar as pertinent to your inquiry reads as follows:

Whoever, by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another, anything of value, is guilty of robbery.

In order for you to find these defendants guilty of robbery, you must find that the government has proved beyond a reasonable doubt each of the following essential elements:

1. That the defendant took something of value from the complainant.

2. That he took it unlawfully and with the intent to convert it permanently to his own purpose.

3. That he took it from the complainant's person or immediate actual possession.

4. That he took it by force or violence against resistance or by putting the complainant in fear.

As to the first element, that the defendant took something of value, the actual value of the thing taken is of no consequence and further, if you find any money was taken from the complaining witness, then that element would be satisfied.

Turning now to the second element, that the defendant took the property unlawfully and with the intent to convert it permanently to his own purpose, intent ordinarily cannot be proved directly because there is

no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act,. (Emphasis Supplied).

As to the third element, that he took it from the complainant's person or immediate actual possession, immediate actual possession means that the thing taken may be on the person or within the reach of the person so long as it is considered to be in such possession that if the complainant knew his property was being taken, such knowledge would likely result in physical violence or a struggle for the possession of the property.

Now, as to the fourth element, that the defendant took the property by force or violence, against resistance or by putting in fear, you will note that the indictment is drawn in the conjunctive and it is not necessary for the government to prove all of those elements in order for this fourth element to be satisfied for the reason that the statute is drawn in the disjunctive and so if you should find that any money was taken from the complaining witness and in the manner which I stated, by force or violence or by putting in fear, that would satisfy the fourth element.

Now, there is another principle of law which you will have for your consideration which becomes appropriate when there is more than one person involved in an alleged offense and that is what is known to the law as aiding and abetting.

In order for you to find either the defendant Hines or the defendant Johnson guilty of the offense for which they are charged, it is not necessary

if the other essential elements of the offense be proved by the government beyond a reasonable doubt, for the government to show that each defendant actually took the property from the complainant, if you find that such defendant was acting in concert with another defendant who did in fact take the property from the person or immediate actual possession of the complaining witness.

In other words, under the law, a person who advises or connives in any criminal offense or aids or abets the principal offender is charged as a principal and is equally guilty if proven by the quantum of proof required by law.

You are instructed, however, that mere physical presence at a scene or an occurrence of a robbery or any other place is not sufficient to constitute an aider and abettor. It is essential that the aider and abettor share in the criminal intent with the party who actually commits the offense, here the offense of robbery.

If you should find that the government has proved beyond a reasonable doubt each and every one of the essential elements that I have enumerated for you, then you may find the defendants guilty of robbery.

If, on the other hand, you should find that the government has failed to prove any one or more of the essential elements beyond a reasonable doubt, then you may find the defendants not guilty of robbery.

THE COURT; To get back to this other, as I understand it, even though there be aiding and abetting, that is not sufficient unless there be a criminal intent?

MR. MAYNARD: Yes, sir.

MR. CURRY: You will give intent?

THE COURT: Yes, sir.

BY MR. MAYNARD:

Q. Is it your testimony that you took Hines down to No. 1 Precinct with Johnson at the same time?

A. No, I did not say that. Johnson was gone.

Q. Johnson had gone?

A. He was carried over to the Juvenile Bureau.

Q. Did you subsequently transport Johnson down to No. 1 Precinct?

A. I think he was transported in the wagon.

Q. Were you the detective assigned to book him and take care of the necessary details with respect to the arrest?

A. That's right.

Q. And did you subsequently book him that evening?

A. Yes.

Q. Did you book him on the Ellis case?

A. Yes.

Q. Would 11:32 p.m. sound about right at No. 1 precinct?

THE COURT: Where did you book him, Officer?

A. He was booked downtown at the Central Cell Block.

THE COURT: He was arrested at 10?

THE WITNESS: No, sir. He was arrested -- after I had the conversation with him, I would say about 8:30 or 9 or quarter of 9.

THE COURT: Where?

THE WITNESS: This was at No. 10 Precinct.

THE COURT: That is where you arrested him?

THE WITNESS: Yes.

BY MR. MAYNARD:

Q. He was subsequently booked downtown, sir, is your testimony, on this offense.

A. That's right, the Ellis offense.

THE COURT: Excuse me. Let's see if we understand each other. My understanding of this officer's testimony is that this defendant voluntarily came to the precinct and when he got there he talked to him on this night around 7:30 or something like that and he talked to him about this case and as a result of the information he previously had as a result of talking to this other defendant, this man was then and there arrested.

MR. MAYNARD: If Your Honor please, my problem is this: The book at the robbery squad shows that this defendant was booked for a case involving one Jarvis at 11:32 p.m. on April 5 and the booking in this case shows 9:15 a.m. on the 6th. I am trying to test the officer's recollection.

THE COURT: I am giving you that opportunity. On what has been said here, he did have probable cause.

MR. MAYNARD: If his recollection was accurate there would be but if the defendant's was accurate, there would not be, Your Honor.

THE COURT: In connection with the statements made, it is for me to determine the credibility and that being my function, I do determine it, that the officer's statement is credible and that this man came to the precinct voluntarily and after coming there, the officer was at that time possessed

sufficiently with information which made for probable cause and having been so possessed, talked to this man and arrested him under the circumstances.

(EXAMINATION OF DETECTIVE BROWN)

Q. Now, did you have a conversation with the defendant Hines at No. 10 Precinct? Don't answer that.

MR. MAYNARD: Objection, Your Honor. May counsel come to the bench?

THE COURT: Yes, sir.

(Bench Conference).

MR. MAYNARD: If Your Honor please, with respect to the defendant Hines, it is our contention that the arrest was illegal. The defendant Hines told me he did not see this officer until the following morning at the robbery squad. He voluntarily came to No. 10 Precinct and was kept there all night and was booked on this crime the following morning. I think the record of the robbery squad will so indicate and it is our contention the arrest was illegal under Bynum against the United States, where a man voluntarily turns himself in and was kept and arrested without probable cause.

I also move to exclude any admission he made on the ground they were made as a result of an illegal arrest.

THE COURT: What illegal arrest?

MR. MAYNARD: The illegal arrest of the defendant Hines. When he arrived home, his wife told him about the arrest of Johnson and he then voluntarily went to the Tenth Precinct and he there talked to Det. Anastacia about a matter totally unrelated to this case and the detective called the robbery squad and they told the detective to hold Hines and he was then taken downtown and kept overnight and he was questioned by this Det. Brown the next morning and he tells me this is the first time he talked to this

detective and he was then booked on this crime something around 9:00 o'clock in the morning and he said if he ever said anything to this detective it would have been the following morning and it is our position that he was held overnight without probable cause and therefore any statement he made would be inadmissible.

THE COURT: Are you talking about Mallory?

MR. MAYNARD: Not Mallory. Illegal arrest.

THE COURT: What was illegal about it?

MR. MAYNARD: No probable cause, if Your Honor please.

THE COURT: For what?

MR. MAYNARD: For the arrest.

MISS LINDERMAN: I have no further questions, Your Honor, except I would like to ask the defendant if he is the same James Hines that had been convicted of disorderly conduct?

THE WITNESS: Disorderly conduct?

BY MISS LINDERMAN:

Q. Yes.

A. No.

THE COURT: Have you a date there?

MISS LINDERMAN: Yes, December 1, 1961, if Your Honor please.

MR. MAYNARD: Objection, if Your Honor please.

THE COURT: Come to the bench.

(Bench Conference)

MR. MAYNARD: If Your Honor please, disorderly doesn't involve moral turpitude.

THE COURT: Some cases do and some don't but he said no. What have you got there?

MR. MAYNARD: I have the record, too.

MISS LINDERMAN: It is my understanding it doesn't have to involve moral turpitude.

THE COURT: What was the nature of this disorderly?

MISS LINDERMAN: Well, any disorderly conduct.

THE COURT: That is not what the Court of Appeals has said. Some disorderly conducts they have held not to be but in any event, he said no.

(End of bench conference).

BY MISS LINDERMAN:

Q. Are you the same James Hines that was convicted of unauthorized use of a motor vehicle?

A. Yes.

MISS LINDERMAN: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. MAYNARD:

Q. Mr. Hines, at the time of this alleged occurrence were you on any status -- did you have any status before the United States Probation office with respect to that unauthorized use conviction?.

A. Do you mean did I have any --

Q. What was your status?

A. Well --

Q. Were you on probation at that time?

A. Yes I was.

Q. Will you tell the Court and the jury why you went to the Tenth Precinct that night?

A. I went around to the precinct because when I called my wife, she told me that my name was indicated in the supposed robbery and so I went around to the precinct to clear myself.

Q. And why?

A. Because I didn't want to provoke my probation. (sic)

MR. MAYNARD: Thank you. I have no further questions.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,260

JAMES HINES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARBARA A. LINDEMANN,
WILLIAM H. WILLCOX,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. In charging the jury on the elements of the crime of robbery did the trial judge err in defining the element of intent when he told the jury that "a person is presumed to intend the natural and probable consequences of his own act"?

2. Did not the trial judge act reasonably and on the basis of sufficient facts when he ruled that appellant's arrest was legal?

3. Was the prosecutor's inquiry of the defendant as to whether he had been convicted of disorderly conduct, which defendant denied, proper, and if there is doubt as to whether it was proper was not the question in all the circumstances harmless?

INDEX

TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,260

JAMES HINES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and Warren Johnson were convicted by a jury of robbing Sylvester Ellis of $16.00 in money. Appellant was sentenced to two to six years imprisonment.[1] The facts are as follows:

Sylvester Ellis, a junior high school student, testified that he was collecting on his paper route on the evening of April 5, 1963. Between 7 and 7:30 p.m. he was in the

[1] Johnson was sentenced under the Youth Corrections Act, 18 U.S.C. 5010(b).

apartment building at 1110 Columbia Road (Tr. 4-5). He had some $18.00 in coins on a step between the second and third floor landings where he was counting it (Tr. 6, 17). Hines and Johnson approached him. Johnson asked him for change for a dime, which Ellis gave him. Johnson then grabbed Ellis around the neck and choked him. Hines "started getting all [my] money." (Tr. 6-8). "Then they let me go and I started hollering. . . . Then James Hines ran down the steps and Warren Johnson ran up the steps and then people started coming out the doors." (Tr. 8). All but $1.44 of the $18.00 was taken (Tr. 17-18).

Mrs. Cleo Johnson (no relation to the defendant Johnson) testified that she lived in Apartment 20 at 1110 Columbia Road and that on the evening of April 5 "I heard a child screaming. When I opened the door, I saw [Hines] sitting on the stairs. . . . He was picking up some change off the steps and Sylvester was going upstairs and I heard him say, I am going to tell the police on you and I was frightened and I slammed the door. . . ." (Tr. 73-74). Shortly thereafter she let Ellis into her apartment to call the police (Tr. 74).

Detective Brown testified that at 8 p.m. on the night of the offense Hines told him that he and "another person" walked into 1110 Columbia Road, that they saw Ellis counting money on the steps, that Hines nodded to the other person, who grabbed Ellis around the neck, that Ellis started screaming and people started coming into the hall, and that Hines grabbed the money from the steps and ran down the steps out the door (Tr. 57-58).[2]

Hines and Johnson both took the stand in their own defense (Tr. 91 *et. seq.*; Tr. 118 *et. seq.*). Hines denied robbing Ellis. He claimed that although he was present he did nothing to Ellis and took nothing from him. He testified that the only money which he took from the steps was

---

[2] Brown made reference to "another person", rather than Johnson, in the presence of the jury (See Tr. 53-54). The judge instructed the jury immediately following the testimony about the confession, and in his final charge, that the confession was admissible only against Hines (Tr. 58-59, 166).

his own money which Ellis jarred out of his hand when Ellis ran from Johnson (Tr. 94-95).

As stated, the jury convicted Hines and Johnson of robbery.

STATUTES INVOLVED

Title 14, District of Columbia Code, § 305 provides:

> No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

Title 22, District of Columbia Code, § 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

The judge's charge on the element of intent in the crime of robbery, including the clause "a person is presumed to intend the natural and probable consequences of his act," was unobjected to and correct.

The *Morissette* case, on which appellant relies, is inapposite. It involved a defendant charged with a non-violent crime who admitted doing the act charged and whose legitimate defense of innocent intent was ignored by the trial judge. In the present case the government charged and presented evidence of a crime of violence in which the evil intent was inherent. And the appellant's defense, which the judge recognized in his charge, was not that he took money from the complainant with innocent intent but that he took nothing from and did nothing to the complainant.

II

In view of the uncontradicted testimony that ample evidence of appellant's involvement was presented to the officers when they conducted their investigation at the scene of the crime, and in view of the uncontradicted fact that appellant voluntarily came to the precinct only a few minutes after the occurrence of the crime, the judge clearly acted reasonably and on sufficient facts in ruling that the arrest was proper.

III

The prosecutor's question to appellant about a disorderly conduct conviction was both proper and harmless. Disorderly conduct is a criminal offense proscribed by Act of Congress which may be proved for the purpose of impeaching witnesses under 14 D.C. Code § 305. Some disorderly conduct does not involve moral turpitude, but moral turpitude is not the test for offenses which may be so proved. *Bostic* v. *United States*, 68 App. D.C. 167, 94 F.2d 636 (1937). This Court recently endorsed the use of disorderly conduct convictions to impeach. *Freeman* v. *United States*,—U.S. App. D.C.—, 322 F.2d 426 (1963). Even if there is thought to be doubt as to the correctness of the use of disorderly conduct convictions to impeach, the prosecutor's inquiry was harmless. Appellant denied having been convicted of disorderly conduct. Defense counsel objected and thereafter there was no further ref-

erence to the matter before the jury. Defense counsel did not request a mistrial or ask that the jury be instructed to disregard the question. Appellant admitted to a conviction for unauthorized use of a vehicle. In his charge the judge clearly indicated that the jury was to give consideration only to the unauthorized use conviction.

ARGUMENT

I. The trial judge correctly charged the jury on the element of intent in the crime of robbery.

Tr. 4-11, 17-18, 57-58, 73-74, 94-95, 167-170.

The trial judge charged the jury carefully and at length on the four elements of the crime of robbery (Tr. 167-169). Elaborating on the element of intent to convert the complainant's property to the defendant's own use, he said:

> Turning now to the second element, that the defendant took the property unlawfully and with the intent to convert it permanently to his own purpose, intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said and a person is presumed to intend the natural and probable consequences of his act."

There was no objection to this charge. Rule 30, Fed. R.Cr. P. Appellant objects on appeal to the clause "a person is presumed to intend the natural and probable consequences of his act." This clause, as well as the whole paragraph which contains it, is a perfectly correct statement of the law. *United States* v. *Green*, 246 F.2d 155, 159 (7th Cir. 1957), *cert. denied*, 355 U.S. 871; *Lantis* v. *United States*, 186 F.2d 91 (9th Cir. 1950); *Myres* v. *United States*, 174 F.2d 329, 334 (8th Cir. 1949), *cert. denied*, 338 U.S. 849 (1949). Appellant relies on *Morissette* v. *United States*, 342 U.S. 246 (1952). In that case the defendant took government property which he contended he thought was

abandoned junk. The Supreme Court reversed the conviction because the judge's charge gave no consideration to *Morissette's* "profession of innocent intent", 342 U.S. at 276, which was a legitimate defense. Here the act of robbery by force and violence was charged and shown by the government's evidence (Tr. 4-11, 17-18, 57-58, 73-74). The evil intent was "inherent in the act itself," *Imholte* v. *United States*, 226 F.2d 585, 590 (8th Cir. 1955), a fact not true in *Morissette*. Moreover, appellant's defense in the present case was not that he innocently took money from the complainant. He claimed that although he was present he did nothing to the complainant and took nothing from him (Tr. 94-95).[3] Whatever may be said about the challenged charge where the defendant admits the act but denies the evil intent, in view of the fact that such admission and such denial are absent in the present case, and in view of the nature of the crime involved, appellant's attack on the charge is academic. All the cases cited by appellant support this view. They involve instances of non-violent crimes where the defendant professed innocent intent, and they do not at all dispute the correctness in the context of this case of the statement that " a person is presumed to intend the natural and probable consequences of his act."

II. The trial judge properly conducted the hearing on the legality of appellant's arrest.

Tr. 5-9, 20-23, 26-29, 35, 46-52, 81, 121, 139.

Appellant says (Br. 7-8) that the trial judge improperly conducted the hearing which he held on the legality of appellant's arrest. The contention is without merit.

The evidence showed that the complainant Ellis was robbed by two men on the inside stairs of the apartment building at 1110 Columbia Road between 7 and 7:30 p.m.

---

[3] It is to be noted that the judge charged the jury, to appellant's benefit, that mere presence at the scene of the crime is not sufficient to establish guilt (Tr. 169-170).

(Tr. 5-9, 20, 81). When the police came Ellis described the two robbers (Tr. 81). He and another witness told the police that one of the robbers had gone to the third floor (Tr. 20-21, 81). The police found Johnson in Hines' apartment on the third floor (Tr. 21, 27-28; See Tr. 35, 121, 139). Johnson admitted the robbery and told the police that Hines was a participant (Tr. 48-49; See Tr. 21-23). Ellis identified Johnson as one of the robbers and Johnson was arrested (Tr. 26-27, 81). Shortly thereafter Hines went voluntarily to the police precinct (Tr. 47). The officers who had conducted the investigation at 1110 Columbia Road went immediately to the precinct when they received the report that Hines had gone there. They arrived about 7:40 p.m. About 8 p.m. Hines admitted the crime to them and he was arrested (Tr. 46-48, 50).

On this record there was ample basis for the judge's ruling that there was probable cause for the arrest, and this is so even if it is assumed that Hines was arrested before he confessed. *Naples* v. *United States*, 113 U.S. App. D.C. 281, 283, 307 F.2d 618, 620 (1962); *Sammie Jackson* v. *United States*, 112 U.S. App. D.C. 260, 302 F.2d 194 (1962). Appellant conceded this below (Tr. 51).[4] He complains, however, that the judge ruled that there was probable cause without giving appellant sufficient opportunity to develop the possibility that he was booked late (See Tr. 46-52). But certainly in the circumstances of this case the hour of booking was irrelevant to the question of probable cause for the arrest. In view of the uncontradicted testimony that ample evidence of

---

[4] Also appellant specifically stated below that he was not challenging the confession on *Mallory* grounds (Tr. 29). *Sawyer* v. *United States*, 112 U.S. App. D.C. 381, 382, 303 F.2d 392, 393 (1962). And *Mallory* clearly does not bar the confession. *United States* v. *Mitchell*, 322 U.S. 65 (1944); *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 405-406, 303 F.2d 411, 416-417, *cert. denied*, 370 U.S. 946 (1962); *Hughes* v. *United States*, 113 U.S. App. D.C. 127, 306 F.2d 287 (1962); *Tony Coleman* v. *United States*, 115 U.S. App. D.C. 191, 317 F.2d 891 (1963); *Sawyer* v. *United States*, *supra*.

appellant's involvement was presented to the officers when they conducted their investigation at 1110 Columbia Road, and in view of the uncontradicted fact that appellant voluntarily came to the precinct only a few minutes after the occurrence of the crime, the judge clearly acted reasonably and on sufficient facts in ruling that the arrest was proper.

III. The prosecutor's question to appellant about a disorderly conduct conviction was both proper and harmless.

Tr. 115-116, 165.

Appellant complains that the prosecutor asked him if he had been convicted of disorderly conduct (Tr. 115). (Appellant denied that he had and the matter was not pursued —Tr. 115-116). The question was proper.

14 D.C. Code § 305 permits impeachment of witnesses, including defendants, by proof ("either upon the cross-examination of the witness or by evidence aliunde") of conviction of crime. Disorderly conduct is defined and proscribed by Congress as a criminal offense in the D.C. Code and in the Statutes at Large. See 22 D.C. Code §§ 1101-1121; 67 Stat. 91, 92-93, 97-98, ch. 159, §§ 202(a)(1), 210, 211(a)(1953). The prohibitions against disorderly conduct are not mere municipal ordinances. Compare *Clawans* v. *District of Columbia*, 61 App. D.C. 298, 62 F.2d 383 (1932). *Some* disorderly conduct as defined by Congress does not involve moral turpitude, but moral turpitude is not the test for the offenses that may be proved under 14 D.C. Code § 305 to impeach witnesses. "The test provided by Congress [the statute reads now as it did in 1937] is clear and certain. Any person who has been convicted of a crime, *i.e.*, a felony or misdemeanor, may have that fact given in evidence against him to affect his credit as a witness. . . . The District of Columbia statute is not limited to convictions of felonies . . . or to convictions of crimes involving moral turpitude. . . ." *Bostic* v. *United States*, 68 App. D.C. 167, 168, 94 F.2d 636, 637 (1937). Compare *Sanford*

v. *United States*, 69 App. D.C. 44, 46, 98 F.2d 325, 327 (1938).

As recently as last year this Court expressed approval of the use of disorderly conduct convictions to impeach witnesses, including defendants. In *Freeman* v. *United States*, —— U.S. App. D.C. ——, 322 F. 2d 426, 428, n.6 (1963) the Court said:

> "[The defendant did not take the stand]. No doubt counsel was not unmindful that on cross-examination the appellant's record might have a tendency to discredit him. It would have become apparent that he had been convicted: in 1954, twice for disorderly behavior; in 1956, of violation of the uniform narcotics law; in 1957, of disorderly conduct and soliciting prostitution; in 1958, of larceny and violation of the Harrison Act; in 1961, of petty larceny."

Even if there is thought to be doubt as to the correctness of the use of disorderly conduct convictions to impeach, in the present case the prosecutor's inquiry was harmless, and is not a ground for reversal. Appellant denied having been convicted of disorderly conduct. Defense counsel objected and thereafter there was no further reference to the matter before the jury (Tr. 115-116).[5]

---

[5] "It is urged that the assistant district attorney, who tried the case below, was guilty of misconduct, prejudicial to defendant, in interrogating defendant on cross-examination as to former convictions for speeding on the streets of Washington. Counsel held a paper in his hand from which he purported to read. Defendant denied in each instance that he had been convicted. The matter was dropped, and no further efforts made on the part of counsel for the prosecution to establish the point. Since defendant denied that he had been formerly convicted and counsel abandoned the matter, it is difficult to understand wherein defendant could be prejudiced. If the denial was false, counsel for the prosecution could have pursued the matter, and established the conviction by evidence aliunde, or by production of a certificate by the clerk of the court wherein the conviction was had. [Citing D.C. Code]. From the failure of the district attorney to pursue the matter beyond the cross-examination, the jury might well conclude or infer that defendant's testimony was true." *Clifton* v. *United States*, 54 App. D.C. 104, 106, 295 F. 925, 927 (1923).

Defense counsel did not request a mistrial or ask that the jury be instructed to disregard the question.[6] Moreover, there is no dispute that appellant's credibility was properly impeached by his admission that he had been convicted of unauthorized use of a vehicle (Tr. 116). And in his charge at the close of the case the judge said:

> Now, there has been introduced into this case testimonty to the effect that the defendant Hines has heretofore been convicted of a criminal offense, namely, unauthorized use of a motor vehicle. The court states to you that the sole purpose for which that record is introduced is for use by you in passing upon the credibility of the defendant Hines. It is not evidence of his guilt for the particular offense for which he is here charged (Tr. 165).

The judge's positive reference to the unauthorized use conviction, coupled with his omission of any reference to a disorderly conduct question or conviction, made it clear to the jury that only the unauthorized use conviction was to be considered.

In all these circumstances the prosecutor's inquiry as to whether appellant had been convicted of disorderly conduct was harmless. It clearly presents no ground for reversal.

---

[6] "Following discussion between counsel and the Court, the Court concluded there was some question about the admissibility of the evidence [of prior convictions] and refused to admit it. No further objection was made by counsel for defendant. No motion was made to instruct the jury to disregard the questions. Under such circumstance we do not believe there was any prejudicial error." *Smith* v. *United States*, 283 F.2d 16, 22 (6th Cir. 1960) (Cited by appellant).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARBARA A. LINDEMANN,
WILLIAM H. WILLCOX,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 720709 691